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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

V.

RYAN CHAMBERLAIN,  
Defendant.

No. CR-14-0316 VC

DEFENDANT'S ***AMENDED*** MOTION TO  
DISMISS COUNT SIX OF THE THIRD  
SUPERSEDING INDICTMENT FOR  
LACK OF SUBJECT MATTER  
JURISDICTION (FRCP 12(b)(2)); MOTION  
FOR JUDGMENT OF ACQUITTAL ON  
COUNT SIX ON SAME GROUNDS

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

Date: February 9, 2015  
Time: 10:30 a.m.  
Court: The Honorable Vince Chhabria

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	)	SIX ON SAME GROUNDS
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	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT THEREOF
RYAN CHAMBERLAIN,	)	
	)	Date: February 9, 2015
Defendant.	)	Time: 10:30 a.m.
	)	Court: The Honorable Vince Chhabria

TO: UNITED STATES OF AMERICA, PLAINTIFF; AND BRIAN STRETCH, ACTING  
UNITED STATES ATTORNEY, NORTHERN DISTRICT OF CALIFORNIA; AND  
PHILIP KEARNEY AND ADAM WRIGHT, ASSISTANT UNITED STATES  
ATTORNEYS:

PLEASE TAKE NOTICE that on February 9, 2016, before the Honorable Vince  
Chhabria, defendant Ryan Chamberlain will move this Court for an order dismissing Count Six  
of the Superseding Indictment charging him with a violation of 18 U.S.C. § 229(a)(1),  
Possession of a Chemical Weapon, on the grounds articulated by the Supreme Court in *Bond v.*  
*United States*, 134 S. Ct. 2077 (2014).

To the extent this Court determines that additional fact finding is necessary to adjudicate

1 this motion, Mr. Chamberlain requests the Court hold this motion in abeyance until the  
2 conclusion of the government's case-in-chief, and reconsider it as a Motion for Judgment of  
3 Acquittal on Count Six.

4 Th motion is based on the following Memorandum of Points and Authorities, the  
5 constitution of the United States, all relevant statutory authority and case law, Fed. R. Crim. P.  
6 12(b)(2), Fed. R. Crim. P. 29, and such argument as may be presented at the hearing of this  
7 motion.

## 8 MEMORANDUM OF POINTS AND AUTHORITIES

### 9 INTRODUCTION

10 "I suspect the Act<sup>1</sup> will not survive today's gruesome surgery. A criminal statute  
11 must clearly define the conduct it proscribes. If it does not "give a person of  
12 ordinary intelligence fair notice" of its scope, it denies due process. The new §  
13 229(a)(1) fails that test. Henceforth, a person "shall be fined ... imprisoned for  
14 any term of years or both . . . whenever he "develops, produces, otherwise  
15 acquires, transfers, directly or indirectly, receives, stockpiles, retains, owns,  
16 possesses, or uses, or threatens to use (1) any chemical "of the sort that an  
17 ordinary person would associate with instruments of chemical warfare" (emphasis  
18 added). Whether that test is satisfied, the Court unhelpfully (and also illogically)  
explains, depends not only on the "particular chemicals that the defendant used"  
but also on "the circumstances in which she used them" . . . Moreover, the  
Court's illogical embellishment seems to apply only to the "use" of a chemical,  
but "use" is only one of 11 kinds of activity the statute prohibits. What, one  
wonders, makes something a "chemical weapon" when it is merely "stockpile[d]  
or possess[ed]?" To these questions, and countless others, one guess is as bad as  
another.

19 No one should have to ponder the totality of the circumstances in order to  
20 determine whether his conduct is a felony. Yet that is what the Court will now  
21 require of all future handlers of harmful toxins - that is to say, all of us. Thanks  
22 to the Court's revisions, the Act, which before was merely broad, is now broad  
23 and unintelligible. "[N]o standard of conduct is specified at all." Before long, I  
24 suspect, courts will be required to say so.

25 *Bond v. United States*, 134 S. Ct. 2077, 2097 (2014)(Scalia, J., concurring in the  
26 judgment)(citations omitted).

27 On October 22, 2015, nearly seventeen months after Mr. Chamberlain's arrest, the  
28 government superceded the Indictment in this case a third time. The last charge, Count Six,

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<sup>1</sup> 18 U.S.C. § 229(a)(1)

1 alleges that Mr. Chamberlain possessed a chemical weapon in violation of 18 U.S.C. § 229(a)(1)  
 2 (the Chemical Weapons Act) – a statute recently challenged in front of the Supreme Court in  
 3 *Bond v. United States*, 134 S. Ct. 2077 (2014). Like that case, the allegations against Mr.  
 4 Chamberlain present no “acts of war, assassination and terrorism.” *Id.* at 2092. Instead, the  
 5 supposed “chemical weapon” alleged in this count is approximately 4.5 grams – **less than a**  
 6 **teaspoon** – of sodium cyanide, along with a small (3" by 1" diameter) energy drink bottle  
 7 allegedly containing a 13 ml mixture of ethyl alcohol, water and a detectable amount of sodium  
 8 cyanide. As Mr. Chamberlain understands it, the government’s case-in-chief lacks *any* evidence  
 9 that Mr. Chamberlain either intended to use this chemical to harm any person or persons, or did  
 10 so. It is further anticipated that the government will present no evidence of a target, a plan, or  
 11 any nefarious purpose on the part of Mr. Chamberlain with respect to this minute quantity of  
 12 sodium cyanide. Just as in *Bond*, the statute at issue plainly does not extend to the allegations of  
 13 Mr. Chamberlain’s entirely local conduct - even assuming he did possess a teaspoon or less of  
 14 sodium cyanide. To the extent it does, the Act is both unconstitutional as applied to him, and is  
 15 an unconstitutional extension of federal police power on the whole.

16 In other words, the prosecution of Mr. Chamberlain on Count Six squarely re-opens the  
 17 issues the Supreme Court grappled with and left unfinished in *Bond*. As explained in detail  
 18 below, Mr. Chamberlain now moves to dismiss the charge that he violated section 229(a)(1)  
 19 because (1) his alleged conduct is not covered by the statute, as interpreted by the *Bond* Court,  
 20 (2) the statute is unconstitutionally vague, both as applied to his alleged conduct and on a whole,  
 21 as interpreted by the Supreme Court in *Bond*, and 3) 18 U.S.C. § 229(a)(1) itself is  
 22 unconstitutional due to its broad drafting, which sweeps in purely local conduct related to  
 23 poisons by its very terms, and thus exceeds Congress’s authority to make laws under either the  
 24 Commerce Clause or to implement treaties under the Necessary and Proper Clause.

25 In making the instant motion, Mr. Chamberlain is cognizant that this Court “will not  
 26 decide a constitutional question if there is some other ground upon which to dispose of the  
 27 case.” *Bond*, 134 S. Ct. at 2087. Mr. Chamberlain further acknowledges that Justice Roberts’  
 28



majority opinion in *Bond* disposed of Bond's conviction while avoiding constitutional issues by 1) reviewing the facts of her case, and 2) holding that such acts constituted conduct of a "purely local nature." *Id.* These are fact-based inquiries, while the larger Tenth Amendment challenges Mr. Chamberlain raises are not. Accordingly, as to the constitutional issues raised here, Mr. Chamberlain files the instant motion as a pretrial Motion to Dismiss on jurisdictional grounds. As to the arguments raised that § 229(a)(1) cannot be construed to reach the allegations of Mr. Chamberlain's purely local conduct, he files this motion as a Judgment of Acquittal on Count Six on jurisdictional and constitutional grounds, to be renewed at the close of the government's evidence.

## FACTUAL BACKGROUND

### **I. Evidence Items Located in Mr. Chamberlain's Apartment**

On May 31, 2014, law enforcement executed a warrant to search Mr. Chamberlain's residence at 1831 Polk Street, #117, San Francisco, California, for abrin, a biological toxin. During the search of Mr. Chamberlain's home, the government seized a number of items, including a small quantity of white powder in a plastic bag, later labeled by the FBI as Evidence Item 7. *See* Declaration of Elizabeth M. Falk (hereafter, "Falk Decl."), Exhibit B, Photograph of Powder in Evidence Item 7.<sup>2</sup> This powder was later analyzed by Dr. Jason Brewer, Chemist Forensic Examiner, who determined the weight of the powder to be 5.1879 grams.<sup>3</sup> *See* Falk Decl., Exhibit A, Brewer Report. Through use of methods that "have not been validated for the purpose of reporting quantitative results", Dr. Brewer "estimated" the concentration of sodium cyanide within this substance at 90%, with a resulting analysis that the powder contained 4.6691

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<sup>2</sup> As stated in the Falk Declaration, it is counsel's understanding that the glass jar and plastic test tube pictured in Exhibit A are FBI collection/laboratory equipment; neither of these vessels were located in Mr. Chamberlain's apartment and are not the original container located that contained the white powder.

<sup>3</sup> To put the volume of this powder in perspective, a teaspoon of salt is approximately 5.69 grams. The charged sodium cyanide is accordingly less than a teaspoon in volume.

1 grams of sodium cyanide. *Id.*<sup>4</sup>

2 In a footnote to his email report, Dr. Brewer places numerous caveats on the  
3 aforementioned purity analysis on Evidence Item 7. Specifically, he writes that “this value is an  
4 approximation based on a one point comparison and an assumption of a linear instrumental  
5 response as a function of cyanide concentration. This approach has not been validated, an  
6 estimation of uncertainty can not be provided, and there is no traceability for the estimated  
7 purity. Thanks, Jason.” *Id.* Despite these numerous disclaimers, Dr. Brewer nonetheless  
8 concludes that the 4.661 grams of “pure” sodium cyanide he identifies (90% of the 5.1879 gram  
9 mixture) represents 30 lethal doses of sodium cyanide. In supporting this figure, Dr. Brewer  
10 cites one source - the “Disposition of Toxic Drugs and Chemicals in Man” (Randall C. Baselt,  
11 5<sup>th</sup> Edition, page 412) - for an estimate of 200 mg of potassium cyanide as the “minimum adult  
12 lethal dose.” *Id.* Without citation, Dr. Brewer then converts the Baselt-reported 200 mg  
13 potassium cyanide lethal dose to 150 mg of sodium cyanide. *Id.* Dividing 4.5 (4.666 rounded  
14 down) by 150, Dr. Brewer arrives at his figure of 30 lethal doses in Evidence Item 7.<sup>5</sup>

15 In addition to the powder described above, Dr. Brewer tested the contents of a small blue  
16 and black “relaxation shot” bottle located in Mr. Chamberlain’s apartment, labeled by the FBI as  
17 Evidence Item 12. *See* Falk Decl., Exhibit D, Photograph of I Chill bottle. According to reports  
18 provided in discovery by Dr. Brewer, the 13 ml contents of the bottle (Evidence Item 41) tested  
19 positive in some way for some form of cyanide, as well as for water and ethyl alcohol. *See* Falk  
20 Decl, Exhibit C (photograph of liquid); *see also* Exhibit E, Brewer Report at 11253. Per this  
21 report, specific details do not exist about the purported percentage of cyanide within Evidence  
22 Item 41. *See id.*

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23  
24 <sup>4</sup> Mr. Chamberlain has challenged the aforementioned analysis in his First Motion *in*  
25 *Limine*. *See* Docket 145. For the purpose of this Motion to Dismiss, however, Mr. Chamberlain  
26 will assume all facts in the government’s favor; he reserves the right to submit a new factual  
27 recitation in support of this Motion should the Court elect to adjudicate it as a Motion for  
28 Judgment of Acquittal under FRCP 29.

<sup>5</sup> Once again, to put this figure in perspective, Evidence Item 7 measures less than a  
teaspoon in volume. *Id.*; *see also* Falk Decl. at ¶ 14.

1 To date, the government has not provided Mr. Chamberlain any discovery reflecting any  
 2 intent on Mr. Chamberlain's part to use the sodium cyanide *for anything*, much less to harm  
 3 another person or person. The government's case similarly lacks evidence as to where Mr.  
 4 Chamberlain allegedly obtained the sodium cyanide and/or what he intended to use the sodium  
 5 cyanide for.

## 6 LEGAL BACKGROUND

### 7 I. HISTORY OF 18 U.S.C. § 229 - THE CHEMICAL WEAPONS ACT

#### 8 A. The Treaty - the Chemical Weapons Convention of 1997

9 In 1992, in response to the horrors of chemical warfare inflicted upon soldiers and  
 10 civilians alike from the era of World War I through the Gulf War, an internationally-membered  
 11 group named the Conference on Disarmament began intensely drafting an international treaty  
 12 against the use or development of chemical weaponry. See Falk Decl, Exhibit F, Genesis and  
 13 Historical Development of CWC, at 3. These efforts culminated in 1996 with the Chemical  
 14 Weapons Convention, an international arms-control agreement established to "achieve effective  
 15 progress towards general and complete disarmament . . . including the prohibition and  
 16 elimination of all types of weapons of mass destruction." See Falk Decl, Exhibit G at 1,  
 17 *Convention on the Prohibition of the Development, Production, Stockpiling, and Use of*  
 18 *Chemical Weapons and on Their Destruction*, Preamble. In a series of Articles, the treaty  
 19 requires signatory states to adhere to a number of obligations and rules, including:

- 20 a) a prohibition on the development, production, acquisition, stockpiling,  
 21 retention, or transfer of chemical weapons;
- 22 b) a prohibition on the use of chemical weapons;
- 23 c) a prohibition on engaging in military preparations for the use of chemical  
 24 weapons;
- 25 d) a prohibition on any nation to "assist, encourage or induce" anyone to engage  
 26 in any of the aforementioned activities.

27 *Id.* at Article I (p. 2). The treaty also obliges signatories to destroy chemical weapons  
 28

1 that “it owns or possesses, or that are located in any place under its jurisdiction or control.” *Id.*  
 2 Finally, the nation state signatories must destroy chemical weapons abandoned on other  
 3 properties, destroy chemical weapons production facilities, and restrain from the use of riot  
 4 control agents as “methods of warfare.” *Id.*

5 The Convention defines the term “chemical weapon” in Article II. As relevant here,  
 6 “chemical weapons” are “(a) toxic chemicals and their precursors, except where intended for  
 7 purposes not prohibited under this Convention, as long as the types and quantities are consistent  
 8 with such purposes.” *Id.* at 3. Toxic chemical is then further defined as “any chemical which  
 9 through its chemical action on life processes can cause death, temporary incapacitation or  
 10 permanent harm to humans or animals. This includes all such chemicals, regardless of their  
 11 origin or of their method of production, and regardless of whether they are produced in facilities,  
 12 in munitions, or elsewhere.” *Id.* As expressed “for the purpose of implementing the  
 13 Convention”, certain toxic chemicals subjected to international verification measures by means  
 14 of neutral inspectors were specified as particularly dangerous by the Convention, and are listed  
 15 under Schedules I, II, and III. *Id.* at 3; *see also* Convention at 49-54 (listing various toxic  
 16 chemicals and the corresponding schedules.) While sodium cyanide is not listed under any of  
 17 the Schedules, there is little doubt among scholars and scientists alike that sodium cyanide – a  
 18 fast acting poison - falls under the CWC’s broad definition of “toxic chemical.”

19 Article VII of the Convention addresses the requirements for signatory states to  
 20 implement the Convention’s obligations on home territory. In this vein, signatory state parties  
 21 Shall, in accordance with its constitutional processes, adopt the necessary measures to  
 22 implement its obligations under this Convention. In particular, it shall:

- 23 (a) Prohibit natural and legal persons anywhere on its territory or in any other place  
 24 under its jurisdiction as recognized by international law from undertaking any  
 25 activity prohibited to a State Party under this convention, including enacting  
 26 penal legislation with respect to such activity;
- 27 (b) Not permit in any place under its control any activity prohibited to a State Party

1 under this Convention, and

- 2 (c) Extend its penal legislation enacted under subparagraph (a) to any activity  
3 prohibited to a State Party under this Convention undertaken anywhere by natural  
4 persons, possessing its nationality, in conformity with international law.

5 *Id.* at p. 18. From this text, it is clear that the implementation requirements of the CWC  
6 necessitate any State Party to “enact penal legislation” that “prohibits natural persons” from  
7 undertaking any activity prohibited to a States Party under the Convention”

## 8 **B. Ratification and Implementation**

9 In 1997, the United States ratified the treaty. Because the Convention itself was “not  
10 self-executing” it required additional domestic legislation to implement the treaty and comply  
11 with its mandates. *See* Bond, 134 S. Ct. at 2085. Thus arose the Chemical Weapons Convention  
12 Implementation Act of 1998, which closely tracks the language of the Treaty itself. *Id.* In order  
13 to “fulfill its obligations under the Convention,” Congress decided to mirror the language of the  
14 treaty with respect to terms such as “chemical weapon,” “toxic chemical,” and “peaceful  
15 purpose.” *Id.* at 2084-2085; *see also* Falk Dec., Convention, Exhibit G at Art. II(1)(a), II(2),  
16 II(9)(a).

17 Few criminal prosecutions ensued in this country under 18 U.S.C. § 229(a)(1) after the  
18 implementation legislation passed. Then in 2007, the case of Carol Ann Bond arose.

## 19 **II. BOND V. UNITED STATES**

### 20 **A. Facts of Bond**

21 In *Bond*, the Supreme Court addressed the conviction of defendant Carol Anne Bond in  
22 Pennsylvania for violating the identical section of 18 U.S.C. § 229 charged here - possession  
23 (and in Ms. Bond’s case, use) of a chemical weapon *Id.* at 2085. In that case, the defendant  
24 stole an unknown quantity of “10-chloro-10H-phenoxarsine” from her employer and ordered  
25 “potassium dichromate (a chemical commonly used in printing photographs or cleaning  
26 laboratory equipment) on Amazon. *Id.* Both chemicals are toxic and lethal to humans. *Id.* No  
27 less than 24 times, Bond attempted to harm her husband’s pregnant girlfriend by spreading  
28

1 combinations of these chemicals on “her car door, mailbox, and door knob.” *Id.* Bond was  
 2 eventually caught by U.S. postal inspectors on video and was charged in federal court. *Id.* After  
 3 the district court denied her constitutional and statutory challenges, she pled guilty under a  
 4 conditional plea agreement that preserved the right to appeal the constitutionality of her  
 5 conviction. *Id.* at 2086. The case eventually made its way to the Supreme Court, which  
 6 considered whether § 229 “reaches a purely local crime: an amateur attempt by a jilted wife to  
 7 injure her husband's lover, which ended up causing only a minor thumb burn readily treated by  
 8 rinsing with water . . .” *Id.* at 2083.

9 Before the Court, Bond set forth three arguments that her conviction should be  
 10 overturned. *See* Falk Dec., Exhibit H, Brief for Petitioner, *Bond v. United States*, No. 12-158  
 11 (May 8, 2013). First, Bond argued that § 229 on the whole is unconstitutional under the 10<sup>th</sup>  
 12 Amendment because it attempts to codify a “general federal police power” under the guise of  
 13 implementing a treaty, which is an unconstitutional extension of the authority granted to  
 14 Congress under the Necessary and Proper Clause, (U.S. const. art. I § 8. cl.18). *Id.* at 18.  
 15 Second, she argued that the Court could avoid this constitutional issue by instead interpreting the  
 16 statute as “appl[ying] only to the kind of conduct the Convention addresses - namely, warlike  
 17 conduct that would violate the Convention if undertaken by a signatory state . . . [to] comport  
 18 with Congress’ view that a violation of section 229 is per se a crime of terrorism.” *Id.* Third,  
 19 Bond argued that the statute was an unconstitutional extension of federal police power as  
 20 applied to her conduct, in violation of the 10<sup>th</sup> Amendment. *Id.* at 19.

#### 21 **B. The Supreme Court’s Majority Holding in *Bond* Dodges Constitutional Issues**

22 Writing for the majority, Chief Justice Roberts agreed with Bond and overturned her  
 23 conviction. *Id.* at 2094. Much to the dismay of the three concurring justices, however, the  
 24 majority opinion failed to consider the constitutionality of § 229, but held instead that the statute  
 25 was inapplicable to Bond’s conduct under a newly declared “clear statement rule” – that  
 26 Congress must not have intended § 229(a) to reach the “purely local criminal activity” that was  
 27 Bond’s conduct. *See id.* at 2083; *see also Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991);*  
 28

1 *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3147 (1985)(setting forth clear statement  
 2 jurisprudence); *see also* Harvard Law Review Association, Clear Statement Rules, Federalism,  
 3 and Congressional Regulation of States. 107 Harv. L. Rev. 1959 (June, 1994):

4 Clear statement rules, with their requirement of express indications of  
 5 congressional intent to effect certain specific legislative goals, stand at a remove  
 6 from a strictly textualist methodology. Although such rules appear to fit  
 7 comfortably within a textualist approach in that they emphasize attention to  
 8 statutory language, clear statement requirements reflect considerations that are  
*necessarily external to the statutory text itself. Such rules operate to foreclose a particular interpretation of a statute even though consideration of the legislative text alone -- its language and structure -- might point to a different meaning than the one dictated by the rule.*

9  
 10 *Id.* (emphasis added). Under this doctrinal principle, and to avoid the larger  
 11 constitutional questions raised by *Bond*, the Court overturned her conviction based on a  
 12 “perceived ambiguity” in 229(a):

13 These precedents make clear that it is appropriate to refer to basic principles of  
 14 federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this  
 15 case, the ambiguity derives from the improbably broad reach of the key statutory  
 16 definition given the term—“chemical weapon”—being defined; the deeply serious  
 17 consequences of adopting such a boundless reading; and the lack of any apparent need to  
 do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.

18 *Bond*, 134 S. Ct. at 2090 (citing *United States v. Bass* 92 S. Ct. 515 (1971)).

19 The “clear statement rule” evolving from the *Bond* decision imparts a new, narrower  
 20 reading of permissible federal prosecutions under the statute, in order to ensure that the exertion  
 21 of federal jurisdiction in a particular case does not violate the 10<sup>th</sup> Amendment. In particular,  
 22 the Court narrowed the “very broad” definition of “chemical weapon” articulated in the text of  
 23 the statute, to ensure that the accusations of “use of a chemical weapon” go beyond “use[] [of] a  
 24 chemical in a way that caused some harm.” *Id.* at 2090. In order to do so, the Court found it  
 25 appropriate to look past the statutory definition of “chemical weapon” in favor of its “ordinary  
 26 meaning,” which necessarily “takes account of both the particular chemicals that the defendant  
 27 used and the circumstances in which she used them.” *Id.* Taking what can only be described as a  
 28 common sense approach, the Court further held that the ordinary meaning of “chemical weapon”



1 “typically connotes ‘[a]n instrument of offensive or defensive combat’ or ‘an instrument of  
2 attack or defense in combat, as a gun, missile, or sword.” *Id.* Any other reading, the Court held,  
3 would “transform the statute from one whose core concerns are acts of war, assassination, and  
4 terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults.” *Id.*  
5 at 2092 (“As the Government reads section 229, ‘hardly’ a poisoning ‘in the land would fall  
6 outside the federal statute’s domain.’”)(citation omitted).

### 7 **C. The Concurring Opinions in *Bond* Find the Statute Unconstitutional**

8 Concurring in the Court’s judgment only, Justice Scalia’s scathing concurrence in *Bond*  
9 fails to find the ambiguity in § 229(a)(1)’s definition of “chemical weapon” that the majority  
10 opinion does. *Id.* at 2096 (Scalia, J. concurring). Instead, the concurrence laments the  
11 majority’s effort to convolute a clear definition of “chemical weapon” into an arbitrary one, as a  
12 criminal statute must “clearly define the conduct it proscribes. If it does not ‘give a person of  
13 ordinary intelligence fair notice’ of its scope, it denies due process.” *Id.* at 2097. According to at  
14 least three justices, “the *new* § 229(a)(1) fails that test” because the statute no longer contains a  
15 clear statement of prohibited conduct. *Id.* As Justice Scalia views the revised statute, use of  
16 particular chemicals are now covered depending on circumstance - and only after-the-fact is the  
17 appropriateness of federal jurisdiction determined. *Id.* (comparing the potential poisoning of a  
18 goldfish to the potential poisoning of a Congressman’s goldfish with intent to send a menacing  
19 message). This does not give ordinary persons fair notice of the statute’s prohibitions:  
20

21 We have here a supposedly “narrow” opinion which, in order to be  
22 “narrow”, sets forth interpretive principles never before imagined that will  
23 bedevil our jurisprudence (and proliferate litigation) for years to come. The  
24 immediate product of these interpretive novelties is a statute that should be the  
25 envy of every lawmaker bent on trapping the unwary with vague and uncertain  
26 criminal prohibitions.

27 *Id.* at 2102. In addition to finding the “new” statute hopelessly vague, Justice Scalia’s  
28 concurring opinion found the Act unconstitutional as applied to Bond. *Id.* at 2098. In this vein,  
Justice Scalia soundly rejected the proposition that the Necessary and Proper Clause intersects  
with the Treaty Clause in a manner that enables Congress to implement treaty obligations at the



1 expense of bedrock constitutional principles, such as the lack of a plenary federal police power.  
 2 *Id.* at 2098-2101 (“No law that flattens the principle of state sovereignty, whether or not  
 3 ‘necessary,’ can be said to be ‘proper.’). Because the government’s sole defense of the  
 4 constitutionality of the statute rested on this intersection, the Act is unconstitutional to the extent  
 5 it conferred a general federal police power over Bond.

## 7 ARGUMENT

### 8 **I. UNDER THE BOND MAJORITY APPROACH, THIS COURT MUST DISMISS** 9 **COUNT SIX BECAUSE 18 U.S.C. § 229(a)(1) DOES NOT REACH THE** **ALLEGATIONS OF MR. CHAMBERLAIN’S PURELY LOCAL CONDUCT**

10 Assuming the facts most favorably to the government, this case involves Mr.  
 11 Chamberlain’s alleged possession of less than a teaspoon of sodium cyanide, as well as a small  
 12 “I Chill” energy shot bottle containing a detectable amount of sodium cyanide mixed with water  
 13 and ethyl alcohol. This is a *tiny* amount of a toxic chemical – well beneath the quantities used in  
 14 local sodium cyanide poisoning cases routinely tried in state court. *See, e.g.,*  
 15 <http://www.cnn.com/2014/11/08/justice/pennsylvania-doctor-cyanide-poisoning/> (*Ferrante* case  
 16 in which doctor was convicted of purchasing a half pound of sodium cyanide for use in fatal  
 17 poisoning of wife). Nor is Mr. Chamberlain’s alleged possession of the teaspoon of sodium  
 18 cyanide accompanied by allegations that he intended to carry out any sort of terrorist plot, mass  
 19 murder, or any other action that would have “caused mass suffering”. Quite simply, the  
 20 government’s case will fail to show that Mr. Chamberlain intended to do anything with the  
 21 alleged sodium cyanide, even if there is sufficient evidence that he possessed it. The facts of the  
 22 instant case are accordingly more innocuous than *Bond* - a woman who not only purchased lethal  
 23 quantities of two toxic chemicals, but attempted to use them 24 times to harm another human  
 24 being.

25 *Bond* simply does not support the prosecution of Mr. Chamberlain on Count Six of the  
 26 Third Superseding Indictment. In its holding, the *Bond* court indicated that the proper scope of  
 27 the criminal statute involved “terrorist plots or the possession of extremely dangerous substances  
 28

1 *with the potential to cause severe harm to many people.* “ *Bond*, 134 S. Ct. at 2092 (emphasis  
 2 added)(citing *United States v. Ghane*, 673 F.3d 771 (C.A.8 2012) (defendant possessed enough  
 3 potassium cyanide – 177 grams at 75% pure – to kill 450 people); *United States v. Crocker*, 260  
 4 F. App’x 794 (6th Cir. 2008) (defendant attempted to acquire VX nerve gas and chlorine gas as  
 5 part of a conspiracy made with an undercover FBI agent to attack a federal courthouse); *United*  
 6 *States v. Krar*, 134 F. App’x 662 (5th Cir. 2005) (per curiam)(defendant possessed 10 containers  
 7 of chemicals, including a “large quantity” of sodium cyanide, along with numerous machine  
 8 guns, silencers, grenades, hundreds of thousands of rounds of ammunition, anti-government  
 9 militia literature, and documents that discussed the manufacture of various poison gases, the  
 10 delivery of poison gas, and how poison gas kills people)<sup>6</sup>; *United States v. Fries*, 2012 WL  
 11 689157 (D. Ariz., Feb. 28, 2012) (defendant set off a homemade 5 gallon chlorine bomb in the  
 12 victim’s driveway, requiring evacuation of a residential neighborhood); *see also United States v.*  
 13 *Detrixhe*, No. 2:08-CR-42 (N.D. Tex. 2008)(defendant arranged to sell 62 pounds of sodium  
 14 cyanide to an informant for delivery to a member of the Aryan Brotherhood)<sup>7</sup>; *United States v.*  
 15 *Konopka*, Case No. 02-CR-224 (N.D. Ill 2002)(defendant prosecuted for storing 7 containers of  
 16 chemicals in Chicago Transit Authority underground passageway, including nearly 1 pound of  
 17 sodium cyanide and 1/4 pound of potassium cyanide; defendant admitted to being a part of  
 18 group called “Realm of Chaos” that had damaged power stations and communication facilities  
 19 in Chicago)<sup>8</sup>.

20 Notwithstanding the repetitive hyperbole of the government to the contrary, this case

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22 <sup>6</sup> See Falk Dec, Exhibit I (documents from *United States v. Krar*, Case No.  
 23 6:03CR36(1)(E. D. Tex 2003)(including Docket 1, Complaint; Docket 13, Detention Order;  
 24 Docket 109, Government Sentencing Memorandum; Docket 116, Order on Sentencing  
 Objections; Docket 136, Sentencing Hearing Transcript.)

25 <sup>7</sup> See Falk Dec, Exhibit J (documents from *United States v. Detrixhe*, Case No 2:08-CR-  
 26 42-J-BB (N.D. Tex. 2008)(including Docket 1, Criminal Complaint and Docket 39, Factual  
 Basis for Plea Agreement)

27 <sup>8</sup> See Falk Dec, Exhibit K (documents from *United States v. Konopka*, Case No 02-CR-  
 28 224 (N.D. Ill. 2002)(including Docket 1, Criminal Complaint and Docket 20, Plea Agreement).

(and Count Six in particular) have nothing to do with the facts of the above-referenced cases, which each involve “assassination”, “terrorism”, or an act “with the potential to cause mass suffering.” *Id.* at 2092. There is simply no evidence of any such intent or conduct on the part of Mr. Chamberlain that makes this case different in scope than the conduct the Supreme Court rejected in *Bond*. As Justice Roberts instructs, the newly narrowed definition of “chemical weapon” supercedes the statutory definition with the words’ “natural meaning”. *Id.* at 2090. After *Bond*, the propriety of a federal prosecution under 18 U.S.C. § 229(a)(1) rises and falls on whether this new definition of “chemical weapon” is met, including 1) the particular chemicals that the defendant “used” and 2) the circumstances in which she used them. *Id.* Neither factor support conclusion that the instant prosecution is a federal crime.

**A. The Particular Chemical Allegedly “Used” by Mr. Chamberlain do not Support the Prosecution of Count Six in Federal Court.**

Although the chemical charged in Count Six, sodium cyanide, is clearly a “toxic chemical” as defined by the statute, the chemical compounds Bond possessed had equally dangerous toxic properties and were similarly lethal. *See* Falk Dec., Exhibit L, Brief for United States in *Bond v. United States*, No. 12-158 (May 8, 2013) at 4 (“One-half a teaspoon of 10-chlorophenoxarsine (which is not available to the general public) may be lethal orally to an adult, which a few ingested crystals could kill a child. One to one-and-one-half teaspoons may be lethal to the touch . . . the other chemical, potassium dichromate, is lethal in even smaller quantities. . .” There is accordingly no rational basis from which this Court can distinguish sodium cyanide from the chemicals at issue in *Bond*. Neither set of chemicals appears in the CWC’s Annex on Chemicals (see Falk Dec., Exhibit M) and neither substance bear a “resemblance to the deadly toxins that are ‘of particular danger to the objectives of the Convention.’” Sodium cyanide, like the chemicals possessed by Bond, can be lawfully obtained and has gainful societal uses in the gold mining industry. It is a far cry from sarin or mustard gas. *Bond*, 134 S. Ct. at 2084.

The quantity of chemical at issue here mandate a similar conclusion, as there is absolutely no federal interest implicated in Mr. Chamberlain’s alleged simple possession of *l*

1 *teaspoon* of any chemical – even sodium cyanide – without more. As noted by Bond, such a  
 2 prosecution is something that “the Convention itself does not require . . . federal possessory  
 3 crimes are rare and are typically reserved for exceedingly dangerous substances or materials,  
 4 and/or include an explicit jurisdictional element.” Falk Dec., Exh. H, Brief for Petitioner, at 45.  
 5 Though the Supreme Court in *Bond* seemingly approved of other federal prosecutions involving  
 6 possession of cyanide, the quantities at issue were far greater and the circumstances of use were  
 7 far more serious. *See, e.g., Ghane*, 673 F.3d at 776; *id.* at 776, n. 3 (defendant possessed “177  
 8 grams of 75% pure potassium cyanide” and had described thoughts of harming numerous other  
 9 people affiliated with the Corps of Engineers); *Krar* (large quantity of sodium cyanide at issue  
 10 along with 9 other containers of chemicals, arsenal of weapons and anti-government literature);  
 11 *Detrixhe* (attempt to sell 62 pounds of sodium cyanide to undercover agent for use by white  
 12 supremacist group). A finding by this Court that the government has a legitimate federal interest  
 13 in prosecuting the simple possession of a mere teaspoon of a toxic chemical is tantamount to a  
 14 holding that *every poisoning case* – regardless of substance or quantity, is a federal crime. This  
 15 conclusion would directly violate the federalism principles that the Supreme Court in *Bond* so  
 16 deliberately protected.

17 **B. The Circumstances in Which Mr. Chamberlain Allegedly “Used” the Sodium**  
 18 **Cyanide Do Not Support the Prosecution of this Count in Federal Court.**

19 Nor do the circumstances in which Mr. Chamberlain is alleged to have “used” the  
 20 sodium cyanide support the instant prosecution. In *Bond*, the Supreme Court viewed “use as a  
 21 weapon” as “typically connot[ing] ‘[a]n instrument of offensive or defensive combat’ or ‘an  
 22 instrument of attack or defense in combat, as a gun, missile or sword.’” *Id.* at 2090. Indeed,  
 23 critical to the Court’s holding was a common sense conclusion that Bond’s actions did not  
 24 portray the type of “warlike” action that the Chemical Weapons Convention intended to address.  
 25 *Id.* Here, the government will not present any evidence at trial that Mr. Chamberlain ever used,  
 26 threatened to use, or attempted to use the sodium cyanide to harm *anyone* – even less harmful  
 27 behavior than the defendant in *Bond*, who actually did use the chemicals against another person.  
 28 In contrast, here there is no evidence that the substance ever left Mr. Chamberlain’s apartment.

1 The facts of the instant case accordingly fall even lower on the totem pole than *Bond*, who at  
 2 least used chemicals to commit a “common law assault” that could arguably be categorized as an  
 3 “assassination.”

4 In summary, the government has no evidence that the substance allegedly possessed by  
 5 Mr. Chamberlain was an extremely dangerous substance *in a quantity*, or *under circumstances*  
 6 that constituted assassination, terrorism, or had “the potential to cause mass suffering.” *Id.* at  
 7 2092. In no uncertain terms should the conduct alleged against Mr. Chamberlain in Count Six –  
 8 simple possession of less than a teaspoon of sodium cyanide - subject him to indeterminate  
 9 federal sentencing penalty of “any term of years” and up to life imprisonment in federal prison.  
 10 This Court should avoid the grave ramifications of this absurd result, and hold that § 229(a)(1)  
 11 does not reach the conduct alleged in this case.

12 **II. THIS COURT MUST DISMISS COUNT SIX BECAUSE 18 U.S.C. § 229(a)(1) IS**  
 13 **UNCONSTITUTIONALLY VAGUE AND OVERBROAD, BOTH AS**  
 14 **INTERPRETED BY THE SUPREME COURT IN *BOND* AND BECAUSE THE**  
 15 **SUPREME COURT’S NEW DEFINITION OF “CHEMICAL WEAPON” FAILS**  
 16 **CONSTITUTIONAL SCRUTINY**

17 The Due Process Clause requires that “a penal statute define the criminal offense with  
 18 sufficient definiteness that ordinary people can understand what conduct is prohibited.”  
 19 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This fair warning requirement protects a  
 20 person’s right to “steer between lawful and unlawful conduct,” *Grayned v. City of Rockford*,  
 21 408 U.S. 104, 108 (1972), by insisting that “no man shall be held criminally responsible for  
 22 conduct which he could not reasonably understand to be proscribed.” *Bouie v. City of Columbia*,  
 23 378 U.S. 347, 351 (1964) (citation omitted). Relatedly, a statute may not be so broad and  
 24 unconstrained as to “encourage arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S.  
 25 at 357. Vague laws leave the line between lawful and illegal conduct to be drawn “on an ad hoc  
 26 and subjective basis” by those who enforce the statute, inevitably leading to disparate treatment  
 27 of similarly situated defendants based on the happenstance of the understanding adopted by  
 28 particular police officers, prosecutor, judges, and juries. *Id.* at 109.

In evaluating whether or not a statute is unconstitutionally vague, this Court engages in a

1 two part analysis; (1) the statute must define the offense with sufficient definiteness to provide  
 2 fair warning or adequate notice as to what conduct is prohibited, and (2) it must also define the  
 3 offense in a manner that does not encourage arbitrary and discriminatory enforcement. *See*  
 4 *United States v. Washam*, 312 F.3d 926, 929 (8<sup>th</sup> Cir. 2012). As to overbreadth, a statute is  
 5 constitutionally infirm if it prohibits constitutionally protected conduct in addition to the  
 6 conduct the statute seeks to proscribe. *See Graynard*, 408 U.S. at 114. “What renders a statute  
 7 vague is not the possibility that it will sometimes be difficult to determine whether the  
 8 incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what  
 9 that fact is.” *United States v. Williams*, 553 U.S. 285, 306 (2008).

10 Where a statute imposes a criminal penalty, the standard of certainty required in a statute  
 11 is higher to address due process concerns. *See Village of Hoffman Estates v. Flipside*, 102 S. Ct.  
 12 1186 (1982). Moreover, a court may invalidate a criminal statute on vagueness grounds even if  
 13 there is some perceived valid application. *See Kolender*, 103 S. Ct. at 1859, n. 8; *see also*  
 14 *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015)(“Our holdings squarely contradict the  
 15 theory that a vague provision is constitutional merely because there is some conduct that clearly  
 16 falls within the statute’s grasp.”) As *Johnson* makes clear, facial challenges to criminal statutes  
 17 that do not implicate the First Amendment are valid, even where there is some possible non-  
 18 vague construction. This is precisely what the petitioner did in *Johnson*; accordingly, Mr.  
 19 Chamberlain here raises both facial and as-applied challenges to the statute. *Id*; *see also id.* at  
 20 2574 (Alito, J., dissenting)(lamenting the majority’s dismissal of precedent limiting facial  
 21 challenges to those statutes vague in all applications.)

22 Here, the Supreme Court in *Bond* interpreted the Chemical Weapons Act in a manner  
 23 that avoided constitutional issues as to the scope of the statute’s *jurisdictional* reach. This  
 24 action, however, did nothing to solve the many inherent *vagueness* problems with 18 U.S.C. §  
 25 229(a)(1); if anything, the decision rendered the statute even more impermissibly vague. *See*  
 26 *Bond*, 134 S. Ct. at 2097 (Scalia, J., concurring). Both 1) a plain reading of the statutory  
 27 language, and 2) an interpretive reading of the “new” definition of chemical weapon post-*Bond*  
 28



1 compel this Court's conclusion that 18 U.S.C. § 229(a)(1) is hopelessly vague.

2 **A. The Plain Text of the Statute is Unconstitutionally Vague**

3 Under the plain text of 18 U.S.C. § 229(a)(1), a defendant is guilty of a violation of the  
4 Chemical Weapons Act by 1) possessing any toxic chemical, in any amount, 2) for any purpose  
5 other than articulated, exempted purposes, so long as the type and quantity of the toxic chemical  
6 is consistent with those purposes. *See* 18 U.S.C. § 229(a)(1) and §229F(1)(A). These  
7 "permissible purposes" are further outlined in 18 U.S.C. §229F(7), which sets forth four  
8 categories of non-prohibited conduct; (A) peaceful purposes, defined as "any peaceful purpose  
9 related to an industrial, agricultural, research, medical, or pharmaceutical activity, or other  
10 activity", (B) protective purposes, further defined as "any purpose directly related to protection  
11 against toxic chemicals and to protection against chemical weapons", © unrelated military  
12 purposes, and (D) law enforcement purposes. *Id.*

13 Simply put, several of these areas of non-prohibited conduct are so overly broad, it is  
14 impossible for the average person to decipher the line between prohibited and non-prohibited  
15 conduct. Specifically, § 229F(7)(A) is completely unclear as to what a non-prohibited "other  
16 activity" would or would not be; this definition simply allows a federal prosecutor to be the  
17 ultimate arbiter of whether an ordinary citizen's activity with respect to a toxic chemical is  
18 criminal. Is it a prohibited "research" purpose to possess a teaspoon of a chemical out of  
19 curiosity, however morbid that curiosity may be, without any intent to harm another? Is it a  
20 prohibited "medical" or "pharmaceutical" purpose to possess a chemical with the intent to  
21 commit suicide? What about the possession of sodium cyanide for an "other activity" – such as  
22 the poisoning a pesky raccoon that consistently lurks in one's garage at night? The exemplars  
23 are endless as to the realm of possibilities for prohibited versus non-prohibited conduct under  
24 this definition. This is particularly true in the instant prosecution that alleges possession of *less*  
25 *than one teaspoon* of sodium cyanide - a quantity that is consistent with many potential "other  
26 purposes" besides deployment as a chemical weapon.

27 The statute's vague definitions simply do not provide the average person, including Mr.  
28

1 Chamberlain, with adequate notice of the line between criminal and non-criminal possession of  
 2 toxic chemicals. This is particularly true when the Court considers the incredibly broad  
 3 definition the statute sets forth of “toxic chemical” - a reach that compelled the *Bond* majority to  
 4 conclude that the poisoning of a goldfish with vinegar by a frustrated parent is covered. *See*  
 5 *Bond*, 134 S. Ct. at 2091. Simply put, when a statute’s drafting calls into question whether or  
 6 not “teaching your child a lesson” falls within the scope of exempted “other activity”, this Court  
 7 should find that statute unconstitutionally vague.

#### 8 **B. The “New” § 229 Exacerbates the Statute’s Vagueness Problems**

9 As artfully articulated by Justice Scalia in concurrence, *Bond*’s majority holding applying  
 10 the “clear statement” rule for jurisdictional purposes grossly compounds the statute’s vagueness  
 11 problems. *Id.* at 2097. As instructed by the *Bond* majority, reviewing courts must now evaluate  
 12 federal prosecutions under the CWA by looking at the “natural meaning” (as opposed to  
 13 “statutory definition”) of chemical weapon, and consider “the particular chemicals used and the  
 14 circumstances in which [the defendant] used them” to determine whether a federal crime has  
 15 occurred. Moving forward, possession of a toxic chemical is only considered possession of a  
 16 “chemical weapon” if it is “the sort that an ordinary person would associate with instruments of  
 17 chemical warfare” under circumstances that suggest “combat” and/or comprise “acts of war,  
 18 assassination, and terrorism.” These utterly arbitrary definitions and parameters leave the  
 19 average person with “countless” questions for which “one guess is as bad as another.” *Id.*; *see*  
 20 *also* Bradley, Current Developments: Federalism, Treaty Implementation, and Political Process:  
 21 *Bond v. United States*. 108 A.J.I.L 486, 495 (July 2014)(“As Justice Scalia pointed out in his  
 22 concurrence, the addition of these fairly indeterminate contextual considerations, which are not  
 23 themselves set forth in the statute or defined by Congress, may make it difficult for the statute to  
 24 provide sufficient notice to potential defendants of what conduct the statute is criminalizing.”)

25 The application of this new definition to the facts of Mr. Chamberlain’s case - simple  
 26 possession of less than one teaspoon of sodium cyanide – further cloud the issue. It is hard to  
 27 imagine a situation where possession of 1 teaspoon of sodium cyanide is “warlike” - even if the  
 28



1 Mr. Chamberlain’s theoretical “target” was another person. Is it the nature of the target that  
 2 matters in this definition, or, perhaps, the mode of “attack?” How do the “circumstances” of the  
 3 possession affect the conclusion as to whether the alleged conduct was “warlike?”

4 When a statute is so broad and unintelligible, as the “new” § 229(a)(1) is here, it does not  
 5 give an ordinary person sufficient notice to allow a person to bring her/his actions into  
 6 compliance with the law; nor does it allow a jury or a court to determine who is fairly in  
 7 violation of the law and who is not. Instead, a vague statute allows for the exact thing the Due  
 8 Process Clause is designed to protect against: arbitrary and discriminatory enforcement of a  
 9 statute without fair warning – in language a person of ordinary intelligence would understand –  
 10 of what the law intends to prohibit. Under either evaluation, 18 U.S.C. 229(a)(1) is  
 11 unconstitutionally vague both facially and as applied to Mr. Chamberlain. Count Six must be  
 12 dismissed.

13  
 14 **III. THIS COURT MUST DISMISS COUNT SIX BECAUSE IN ENACTING THE BROADLY**  
 15 **DRAFTED CHEMICAL WEAPONS ACT, CONGRESS EXCEEDED ITS AUTHORITY**  
 16 **IN VIOLATION OF THE 10<sup>TH</sup> AMENDMENT**

17 The Tenth Amendment provides that “[t]he powers not delegated to the United States by  
 18 the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to  
 19 the people.” U.S. Const. amend. X. As drafted, §229 violates the Tenth Amendment because it  
 20 breaches the principles of federalism by permitting a general federal police power and allowing  
 21 for federal prosecution of localized offenses. This is not a valid exercise of constitutional  
 22 authority. As argued by Bond, “if section 229 really made every malicious use of chemicals a  
 23 federal crime, it clearly would exceed Congress’ limited and enumerated powers . Congress  
 24 lacks the power to criminalize every malicious use of chemicals for the simple reason that it  
 25 lacks a general police power.” Falk Dec., Exhibit H, (Brief for Petitioner) at 20.

26 Because 18 U.S.C. § 229(a)(1) does not contain a federal interest element or state a  
 27 constitutional basis for its enactment, its only survives constitutional scrutiny if Congress’  
 28 authority can be located elsewhere in the Constitution. In *Bond*, the government asserted that

1 such authority derives, *carte blanche*, from the Treaty Clause read in concert with the Necessary  
 2 and Proper Clause.<sup>9</sup> Bond disagreed. While the Supreme Court declined to address the  
 3 constitutional issues in that case because it overturned Bond's conviction by means of statutory  
 4 interpretation, the Court should address that question here if necessary.<sup>10</sup> Neither the Commerce  
 5 Clause, nor the Treaty Power in connection with the Necessary and Proper Clause support the  
 6 expansive wording of § 229(a)(1), let alone the present prosecution.

7 **A. 18 U.S.C. Exceeds Congress's Authority Under the Treaty Clause Read in**  
 8 **Concert with the Necessary and Proper Clause**

9 1. As Applied to Mr. Chamberlain's Conduct, the Act is an Unconstitutional  
 Extension of Federal Police Power

10 In *Bond*, the government argued that Congress has unlimited power to enact domestic  
 11 legislation that implements treaties, so long as the legislation does not impact the Bill of Rights.  
 12 Bond objected to that argument, noting that such an interpretation would enable Congress to  
 13 enact countless unconstitutional laws under the auspices of enacting a treaty. *See* Falk Dec.,  
 14 Exhibit H, Brief for Petitioner at 27. Arguing that *Missouri v. Holland*, 252 U.S. 416, 432  
 15 (1920) did not confer *carte blanche* authority on the part of Congress to enact any legislation it  
 16 wished to implement a treaty, Bond argued that the implementation statute was unconstitutional  
 17 as applied to her conduct despite the fact that the Convention is a valid treaty.

18 Here, as in *Bond*, the Chemical Weapons Act as drafted is plainly unconstitutional, as it  
 19 reaches *every* potential malicious use and questionable possession of *every* toxic chemical. The  
 20 existence of a valid, non self-executing treaty undergirding the Chemical Weapons Act (the  
 21 Convention) does not insulate the Act from constitutional scrutiny. *See Reid v. Covert*, 354 U.S.

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23 <sup>9</sup> *See Bond*, 134 S.Ct. at 2087. The Supreme Court found that the government waived its  
 24 alternate argument that the enactment of the CWC fell within Congress' authority under the  
 25 Commerce Clause. *Id.*

26 <sup>10</sup> The Court need only address the constitutional questions if the Court disagrees with  
 27 Mr. Chamberlain and holds that his conduct, as alleged and/or proved up at trial, falls within the  
 28 boundaries of permissible federal prosecutions carved out by the *Bond* majority in its  
 interpretation of the proper scope of 18 U.S.C. § 229(a)(1).

1, 16 (1957)(“No agreement with a foreign nation can confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution.”). Although the treaty itself may be valid, Congress’ effort to implement that treaty through the CWA fails such scrutiny. As previously argued, the Chemical Weapons Act cannot be viewed as anything other than a gross overexertion of a non-existent federal police power. The 10<sup>th</sup> Amendment directly forbids this result. *See United States v. Lopez*, 514 U.S. 549, 561 n 3 (1995)(“Under our federal system, the States possess primary authority for defining and enforcing the criminal law.”)(citations omitted); *see also* Falk Dec., Exhibit H, Brief for Petitioner at 22 (“In keeping with that basic division of power, this Court has never accepted the argument that Congress may regulate criminal conduct with no nexus to matters of federal concern.”)

If this Court need go so far, the Court should find that the application of the Act to Mr. Chamberlain on Count Six of the Third Superseding Indictment is an unconstitutional extension of the Necessary and Proper Clause, as applied to the Treaty Clause. Individuals accused of simple possession of a teaspoon of a non-illegal toxic chemical, absent more, neither implicates the concerns of the Convention nor can be understood as a meaningful (let alone constitutional) effort to implement it. *Id.* at 58. There is little doubt that our international treaty partners have nothing at stake were Mr. Chamberlain prosecuted and convicted (or acquitted) for possessing less than a teaspoon of a toxic chemical. As was the case with Carol Anne Bond, the instant prosecution is far afield of the types of national and international concerns embodied in the treaty. The implementation statute is accordingly unconstitutional as applied to Mr. Chamberlain.

As argued by Bond, *Holland* does not compel a contrary result. *See Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring). In that case, the Supreme Court upheld the Migratory Bird Treaty Act of 1918, an implementation statute addressing “the preservation of migratory birds known to cross the border with Canada.” Falk Dec., Exhibit H, at 28. There, the primary argument raised was the invalidity of the treaty itself. In rejecting this argument, the majority opinion held, in dicta, that “if the treaty is valid there can be no dispute about the validity of the statute under

Article I, Section 8, as a necessary and proper means to execute the powers of the government.” *Holland*, 252 U.S. at 432. Bond disagreed with the government’s interpretation that this statement in *Holland* essentially gives the government a blank check to enact legislation in the name of a valid treaty, as the Court in *Holland* “considered the relative national and state interests, and it concluded that the ‘national interest of very nearly the first magnitude’ trumped what it viewed as a minimal interest in birds ‘only transitorily within the States and ha[ving] no permanent habitat therein.’” Falk Dec. Exhibit H, Brief for Petitioner at 29 (citing *Holland*, 252 U.S. at 435). As pointed out by Bond, this analysis would have been largely unnecessary had the Court genuinely held the view that the federal government could do whatever it wanted, whenever it wanted simply because a valid treaty was in play. *Id.* For similar reasons, this Court should hold that *Holland*’s dicta<sup>11</sup> cannot save the Act from constitutional scrutiny as applied to Mr. Chamberlain’s conduct.<sup>12</sup>

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<sup>11</sup> Mr. Chamberlain alternatively argues that to the extent this Court finds *Holland* controlling, it should be overruled, because “a federal power to implement treaties unconstrained by the Constitution’s structural protections of liberty is incompatible with our founding document. . . if *Holland* really stands for the proposition that any legislation that rationally implements a valid, non-self executing treaty is perforce constitutional, then *Holland* is incompatible with more recent precedents and the Constitution, and it should be overruled.” See Falk Dec, Exhibit H, Petitioner’s Brief at 33-38. In making this argument, Mr. Chamberlain recognizes that this Court not in a position to overrule Supreme Court precedent. He merely makes this argument to ensure the issue is properly preserved for any necessary appeal.

<sup>12</sup> Recently, in *United States v. Fries*, 781 F.3d 1137 (9<sup>th</sup> Cir. 2015) the Ninth Circuit purported to consider the constitutionality of 18 U.S.C. § 229 as applied to a defendant who set off multiple five-gallon-container chlorine bombs in a residential Arizona neighborhood. *Id.*, 781 F.3d at 1148. There, the Ninth Circuit upheld the application of the statute to Fries – largely because the Supreme Court had cited Fries’ prosecution with approval in holding that the Act did not, in contrast, apply to Bond. *Fries* does not discuss *Holland*, nor does it engage in any significant analysis of federalism principles. All told, the Ninth Circuit’s decision upholding the constitutionality of Fries’ prosecution under 18 U.S.C. § 229 is nothing more than a holding that his conduct fit comfortably within the parameters of statutory interpretation articulated in Bond. Fries is accordingly no bar to this Court ruling otherwise when considering the constitutionality of applying the Act to Mr. Chamberlain’s alleged conduct.

2. Mr. Chamberlain Concurs with Justices Scalia, Thomas and Alito that the Treaty Power is a Limited Federal Power and that the Chemical Weapons Act, as Drafted, Well Exceeds Congress' Authority to Implement Legislation to Further a Treaty Under the Necessary and Proper Clause

Although acknowledging that such an argument may be interpreted by this Court as contrary to *Holland*, Mr. Chamberlain additionally preserves the argument for appeal (if necessary) that the Chemical Weapons Convention (a non-self executing treaty) as drafted, exceeds the scope of the Treaty Power as articulated in the Constitution and is thus facially unconstitutional. As succinctly articulated by Justice Alito:

For the reasons set out in Parts I-III of Justice Thomas' concurring opinion, which I join, I believe that the treaty power is limited to agreements that address matters of legitimate international concern. The treaty pursuant to which § 229 was enacted, the Chemical Weapons Convention, is not self-executing, and thus the Convention itself does not have domestic effect without congressional action. The control of true chemical weapons, as that term is customarily understood, is a matter of great international concern, and therefore the heart of the Convention clearly represents a valid exercise of the treaty power. But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power. Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress' reach unless supported by some other power enumerated in the Constitution. The government has presented no such justification for this statute. For this reason, I would reverse petitioner's conviction on constitutional grounds.

*Bond*, 134 S. Ct. at 2111 (Alito, J., concurring in the judgment). For these reasons, Mr. Chamberlain additionally argues that 18 U.S.C. § 229(a)(1) is facially unconstitutional, as its broad language criminalizes conduct on the federal level well in excess of the goals articulated by the Convention. This statute, as drafted, cannot be read as "necessary and proper" to implement the legitimate national and international concerns of the Treaty, which is far more limited in scope than the reach of the implementation statute. The Act as drafted accordingly violates the 10<sup>th</sup> Amendment on its face, as it is an unconstitutional extension of federal power that neither the Necessary and Proper Clause nor the Treaty Clause justifies.

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**B. 18 U.S.C. § 229(a)(1) Exceeds Congress’s Authority Under the Commerce Clause**

By its terms, § 229 also exceeds the scope of Congress’s authority under the Commerce Clause because it purports to regulate non-commercial, intrastate activity – the alleged mere possession of a toxic chemical – that does not substantially affect interstate commerce. On its face, the statute contains no requirement that the conduct make use of channels of interstate commerce, involved instrumentalities in commerce, or have a substantial effect on commerce. *See United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress exceeded the scope of its Commerce Clause powers in statute that criminalized gun possession near schools).

The Supreme Court has emphatically reminded that lower courts and Congress that “even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.” *United States v. Morrison*, 529 U.S. 598, 608 (2000) (citing *Lopez*, 514 U.S. at 557). In reviewing its Commerce Clause jurisprudence as set forth in *Morrison* and *Lopez*, the Supreme Court stated the following:

In *Lopez* and *Morrison*, the Court struck down federal statutes regulating gun possession near schools and gender-motivated violence, respectively, because it found the effects of those activities on interstate commerce insufficiently robust. The Court emphasized the noneconomic nature of the regulated conduct, commenting on the law at issue in *Lopez*, for example, “that by its terms [it] has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” 514 U.S., at 561, 115 S. Ct. 1624. The Court rejected the Government’s contentions that the gun law was valid Commerce Clause legislation because guns near schools ultimately bore on social prosperity and productivity, reasoning that on that logic, Commerce Clause authority would effectively know no limit. Cf. *Morrison*, *supra*, at 615–616, 120 S. Ct. 1740 (rejecting comparable congressional justification for Violence Against Women Act of \*608 1994). In order to uphold the legislation, the Court concluded, it would be necessary “to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S., at 567, 115 S. Ct. 1624.

*Sabri v. United States*, 541 U.S. 600, 607-08 (2004). Section 229(a)(1) would similarly require this Court to “pile inference upon inference” in order to justify the legislation under the Commerce Clause, and in so doing, would result in a grant of “general police power of the sort retained by the States” for all the reasons previously stated *Id.* The statute is an unconstitutional exercise of legislative authority under the Commerce Clause because the statute regulates non-



1 economic activities not affecting interstate commerce.

2 Although the Solicitor General in Bond attempted to defend 18 U.S.C. § 229(a)(1) as a  
3 valid exercise of Congress' Commerce Power, Bond characterized such an argument as a  
4 "nonstarter." Falk Dec., Exhibit N, Petitioner's Reply Brief, at 3. As pointed out by Bond, "the  
5 use of chemical weapons is 'not, in any way, economic activity.'" *Id.* (citing *Morrison*, 529 U.S.  
6 at 613). Nor does the statute contain any jurisdictional element that reflects any intention on the  
7 part of Congress to limit its application to commercial, as opposed to non-commercial activity.  
8 *Id.* at 6 ("the stubborn problem for the government is that, in enacting 229, Congress' stated and  
9 actual concern was with uses of chemicals that implicate the Convention, not uses of chemicals  
10 that substantially affect interstate commerce.") Simply put, there is no language in the statute  
11 that can be reasonably construed as sounding in commerce.

12 In response, the government here may attempt to defend § 229(a)(1) under the  
13 Commerce Clause through *Gonzalez v. Raich*, 545 U.S. 1 (2005). Again, this argument must  
14 fail. The petitioners in *Raich* attempted to carve out an exception in the Controlled Substances  
15 Act to federal regulation of intrastate, home grown marijuana, claiming that such an exercise of  
16 authority exceeded Congress' power under the Commerce Clause. *Id.* at 15. In rejecting this  
17 argument, the Supreme Court held that such local regulation was an essential component to  
18 guaranteeing the viability of "a larger regulation of economic activity, in which the regulatory  
19 scheme could be undercut unless intrastate activity was regulated." *Id.* at 25-26. Unlike the  
20 Chemical Weapons Act, the activities regulated by the CSA are "quintessentially economic"  
21 because it addresses the "production, distribution, and consumption of commodities for which  
22 there is an established, and lucrative, interstate market." Because there is no meaningful way to  
23 distinguish between intrastate and interstate marijuana (such as packaging or labeling  
24 requirements), "a nationwide exemption" for home grown marijuana would easily thwart  
25 regulation of the interstate market. *Id.* at 25; *id.* at 28. Congress' extension of its authority to  
26 purely *intrastate* activity thus bears a rational relationship to the goals of the legitimate  
27 economic regulation of the *interstate* market for marijuana. *Id.*

1           The Chemical Weapons Act, in contrast, has no nexus to commerce whatsoever. Falk  
2 Dec., Exh. N, Petitioner’s Reply Brief 8 (“that statute cannot be defended as something it is not  
3 and never pretended to be.”) “[Any] attempt to analogize this situation to its need to reach  
4 fungible home-grown marijuana is absurd; Congress is not trying to eliminate vinegar or the  
5 countless other household chemicals that can be used for criminal purposes from interstate  
6 commerce.” Because of this utter lack of nexus, the CWA cannot survive a facial challenge to  
7 the extent this Court views it as proper Commerce Clause legislation.

8           Moreover, as applied to the allegations of wrongdoing on the part of Mr. Chamberlain,  
9 Count Six cannot withstand constitutional scrutiny by means of the Commerce Clause. The case  
10 at best involves an alleged possession of a teaspoon of sodium cyanide; to date, the government  
11 has not produced any evidence as to where or how Mr. Chamberlain allegedly procured the  
12 sodium cyanide. His actions have no nexus to interstate commerce, as there is not even any  
13 evidence in this case that Mr. Chamberlain allegedly obtained the sodium cyanide from out of  
14 state, or even that he used “interstate” methods to do so. As previously argued, the evidence  
15 suggests that the sodium cyanide never left Mr. Chamberlain’s apartment. Nothing about his  
16 case suggests any action implicating interstate economic or commercial activity. The  
17 Commerce Clause cannot save Count Six.



## CONCLUSION

Section 229 goes well beyond any potentially legitimate exercise of authority, punishing any person who possesses any toxin even within purely local bounds and without any tie whatsoever to international, or intra-national, activities. Even as narrowed by the Supreme Court in *Bond*, the statute does not apply to the government's allegations of Mr. Chamberlain's purely local conduct. Use of Section 229 to prosecute Mr. Chamberlain for simple possession of a minute quantity of a toxic chemical is analogous to the Pennsylvania U.S. Attorney's office prosecuting Carol Ann Bond for merely possessing the chemicals she had – even without the assaultive conduct alleged. Such an exercise of power would have been soundly rejected by the Supreme Court, and should be rejected here. The prosecution on Count Six is beyond that permitted by Article I, section 8, or any other part of the Constitution. The statute is invalid on its face and as applied here.

Were this Court to allow the instant prosecution to go forward on Count Six, it would open the floodgates to scores of federal prosecutions for possession of minute quantities of toxic chemicals for any *potentially* “nonpeaceful” purpose - the definition of which is the “anyone’s guess” that so troubled Justice Scalia in his concurrence. It would render every poisoning case in American a federal crime. This result is one that this Court should not sanction. Dismissal of Count Six (or a Judgment of Acquittal at the close of the government’s evidence) is appropriate and necessary.

Date: January 19, 2016

Respectfully submitted,

/s/

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